Supreme Court, U.S.
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Nos. 96-1829 and 96-1984

In the Supreme Court of the United States

OCTOBER TERM, 1996

MONTANA, ET AL., PETITIONERS

v.

CROW TRIBE OF INDIANS, ET AL.

CROW TRIBE OF INDIANS,
CONDITIONAL CROSS-PETITIONER

v.

MONTANA, ET AL.

ON PETITION AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the State of Montana and Bighorn County were properly required to surrender to the Crow Tribe of Indians the proceeds of illegal taxes that they imposed on the Tribe's coal and that were paid by Westmoreland Resources, Inc., which extracted the coal pursuant to a lease agreement with the Tribe.

2. Whether the district court and the court of appeals properly concluded that the imposition of the illegal taxes did not cause the failure of the Tribe to receive royalties from Shell Oil Company pursuant to other coal-mining leases that never resulted in mining operations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 92 F.3d 826, amended, 98 F.3d 1194. The opinion of the district court (Pet. App. 17-57) is unreported.

Previous decisions in the case include (1) the initial decision of the district court (Pet. App. 197-227), reported at 469 F. Supp. 154; (2) an opinion by the court of appeals reversing and remanding that decision (Pet. App. 167-196), reported at 650 F.2d 1104, amended, 665 F.2d 1390 (*Crow I*); (3) the decision of the district court on remand (Pet. App. 110-166), reported at 657 F. Supp. 573; (4) an opinion by the court of appeals reversing and remanding that decision (Pet. App. 88-109), reported at 819 F.2d 895 (*Crow II*); (5) a memorandum order of this Court (Pet. App. 87), summarily affirming the judgment in *Crow II*, reported at 484 U.S. 997; (6) an unreported opinion of the district court on remand (Pet. App. 67-86), and an unreported order of certification for interlocutory appeal (Pet. App. 61-66); and (7) an opinion by the court of appeals dismissing the interlocutory appeal (Pet. App. 58-60), reported at 969 F.2d 848 (*Crow III*).

JURISDICTION

The judgment of the court of appeals (Pet. App. 2) was entered on August 6, 1996. Petitions for rehearing were denied on November 21, 1996 and February 21, 1997. Pet. App. 228-229; Cross-Pet. App. 1-2. The petition for a writ of certiorari in No. 96-1829 was filed and docketed on May 16, 1997. The conditional cross-petition for a writ of certiorari in No. 96-1984 was filed on June 13, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. In 1972, the Crow Tribe of Indians (Tribe) and Westmoreland Resources, Inc. (Westmoreland) entered into a coal-mining lease agreement pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a *et seq.* (authorizing leasing of Indian lands for

mining purposes). Pet. App. 171, 199. The agreement granted Westmoreland the right to extract coal located in an area known as the "ceded strip," which is adjacent to the surface boundaries of the Tribe's Reservation in Montana. *Ibid.* The surface of the ceded strip was once part of the Tribe's Reservation, but was subsequently ceded to the United States for settlement, primarily by non-Indians. *Ibid.* The mineral rights in the ceded strip are held in large part by the United States in trust for the Tribe. *Ibid.* The minerals are legally a part of the Tribe's Reservation. *Id.* at 195.

The original lease was renegotiated in 1974, and Westmoreland began mining operations. Pet. App. 122. In 1975, Montana enacted statutes imposing a severance tax and a gross proceeds tax on all coal produced in the State, including coal belonging to the Tribe.[1] *Id.* at 6, 23. Those statutes were adopted despite the opposition of the Tribe, which objected to Montana's taxation of tribal resources. *Id.* at 23. The Montana legislature was aware, at the time it enacted the tax statutes, that their legality as applied to tribal resources would subsequently be determined by the courts. *Id.* at 9.

Westmoreland began paying gross proceeds taxes in 1975 and severance taxes in 1976. Pet. App. 23-27. During the period from 1975 to 1982, the severance tax rate was 30% of the contract sales price of the coal extracted by Westmoreland, while the gross proceeds tax rate was approximately 5% of the con-

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[1] Although it was enacted pursuant to state statute, the gross proceeds tax was ultimately payable to petitioner Big Horn County. Pet. App. 19-20, 25-27. For ease of reference, the petitioners are referred to collectively as "Montana."

tract sales price. *Id.* at 25-26. Montana set the severance tax rate at 30% because it intended to "appropriate most of the economic rent"[2] from tribal coal. *Id.* at 10, 185. During the period from 1975 to 1982, Westmoreland paid $46.8 million in severance taxes and $11.4 million in gross proceeds taxes. *Id.* at 24-27. A significant percentage of the severance taxes was placed in a trust fund containing only the proceeds of severance taxes imposed on Montana coal producers. *Id.* at 24-25, 173. As of June 30, 1993, the book value of that trust fund was in excess of $500 million. *Id.* at 25.

In 1976, the Tribe enacted its own severance tax of 25% of the contract price of coal mined on the Reservation. Pet. App. 19. That tax was originally approved by the Department of the Interior only as to coal located within the surface boundaries of the Tribe's Reservation, and not as to coal located under the ceded strip. *Id.* at 93. The Department of the Interior's refusal to approve the Tribe's tax as to coal extracted from the ceded strip was later determined to be erroneous, and "at all relevant times the Tribe had a valid coal mining tax applicable to Westmoreland's mining on the Ceded Strip." *Id.* at 36. Westmoreland did not pay taxes to the Tribe, however, because it disputed the validity of the Tribe's tax as applied to coal extracted from the ceded strip, and because it wished to avoid concurrent taxation. *Id.* at 31.

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[2] "'Economic rent' is the amount of revenue that can be extracted from an activity, here in the form of royalties and taxes, without significantly discouraging production." Pet. App. 185 n.12.

2. In 1978, the Tribe filed a suit challenging the legality of the severance and gross proceeds taxes, arguing that the taxes were preempted by federal law. Pet. App. 19. The district court dismissed the complaint for failure to state a claim. *Id.* at 197-227. The Tribe appealed to the Ninth Circuit, which reversed and remanded. *Id.* at 167-196. Specifically, the Ninth Circuit held that the Tribe had alleged facts which, if proven, would establish that the challenged taxes were preempted by the Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a *et seq.*, and infringed the Tribe's right of self-government. Pet. App. 185-196.

In 1982, after the decision in *Crow I*, the Tribe and Westmoreland entered into an amended lease, pursuant to which Westmoreland agreed to pay to the Tribe a tax equal in amount to the coal taxes imposed by Montana. Pet. App. 31-32. The agreement also, however, permitted Westmoreland to claim a credit against the tribal tax for any severance and gross proceeds taxes it paid to Montana. *Id.* at 32.

In January 1983, the district court enjoined Westmoreland's payment of the state severance tax, and ordered Westmoreland to deposit into the registry of the court amounts equal to those payable under the severance tax.[3] Pet. App. 35. Also in 1983, the United States intervened on behalf of the Tribe in order to protect the United States' interests as trustee of the coal upon which Montana's taxes were levied. Pet. 5 n.2.

3. After a trial in January 1984, the district court once again concluded that application of the severance and gross proceeds taxes to tribal coal extracted from

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[3] A similar order was entered as to the gross proceeds tax in 1987. Pet. App. 35.

the ceded strip was not preempted by federal law. Pet. App. 110-166. The Tribe appealed, and the court of appeals once again reversed. *Id.* at 88-109. In reversing, the court of appeals held that the severance and gross proceeds taxes on the Tribe's coal

> increase the costs of production by the coal producers, reducing in turn the royalty that can be paid the Tribe. The taxes also forced the coal producers to charge higher prices, reducing the demand for their Montana coal and resulting in fewer sales for the producers and fewer royalties to the Tribe.

Id. at 97. Because the taxes interfered with the "firm federal policy of promoting tribal self-sufficiency and economic development," *id.* at 95, the court of appeals held that they were presumptively preempted, unless supported by a sufficient state interest, *id.* at 100.

The court of appeals further held that Montana had not carried the "heavy burden" of establishing that its taxes on the Tribe's coal were narrowly tailored to support legitimate state interests. Pet. App. 103. To the contrary, the evidence indicated that the coal taxes were not necessary to compensate Montana for the costs created by coal mining, since Montana's revenues from state, local, and excise taxes on the mining activity were more than sufficient to offset the coal-related costs documented by Montana. *Id.* at 103-105. In addition, most of the revenue from the challenged taxes was devoted to purposes other than environmental or coal-related services. *Id.* at 104. Thus, the court of appeals concluded, Montana imposed its taxes on the Tribe's coal "to profit from the Indians' valuable coal resources." *Ibid.* Because Montana had no legitimate interest in appropriating

the Tribe's mineral wealth, the court held, Montana's severance and gross proceeds taxes were not narrowly tailored to advance legitimate state interests, and were preempted by federal law. *Id.* at 105. For similar reasons, the court of appeals held that the taxes were an unlawful infringement upon the Tribe's sovereignty. *Id.* at 105-107.

4. Montana appealed to this Court, which summarily affirmed the judgment of the court of appeals. Pet. App. 87. The case then returned to the district court for further proceedings. In 1989, the district court turned over to the Bureau of Indian Affairs, as trustee for the Tribe, the tax payments that Westmoreland had been depositing into the court's registry pursuant to the district court's earlier orders. *Id.* at 35. Those funds represented Westmoreland's severance tax payments beginning in 1983 and its gross receipts tax payments beginning in 1987, along with accumulated interest. *Ibid.*

The parties then turned their attention to the coal-tax payments Westmoreland had made during the period between 1975 and the date of the orders directing Westmoreland to deposit its tax payments into the court registry. The United States and the Tribe filed amended complaints in which they sought to recover those payments, which totalled approximately $58 million. Pet. App. 24-27, 243-260. They argued that the taxes had been determined to be unlawful, that Montana therefore was not entitled to retain the proceeds of the taxes, that the taxes had substantially injured the Tribe, and that the Tribe, as owner of the coal that had been unlawfully taxed, was legally and equitably entitled to the proceeds of the unlawful taxes. *Id.* at 243-260.

Montana moved for summary judgment on various grounds, including that the district court lacked jurisdiction over what were, in reality, state law claims for restitution, and that in any event the Tribe and the United States had failed to make out the essential elements of the theories of restitution upon which they had relied. Pet. App. 72. The district court denied the motion for summary judgment, holding that the Tribe's request for restitution sounded in federal law, invoking the federal courts' "broad equitable powers to construct a remedy" for the violation of a federal law. *Id.* at 76. The district court further concluded that its power to fashion an equitable remedy under federal law was not limited by the scope of state-law causes of action for restitution. *Id.* at 79-84. Finally, the district court ruled that the question of what equitable remedy, if any, would be appropriate turned on unresolved factual matters. *Id.* at 85.

The district court certified its order denying summary judgment for interlocutory appeal. Pet. App. 61-66. Although it originally granted permission for an interlocutory appeal, the court of appeals subsequently concluded that permission to appeal had been improvidently granted, and dismissed the appeal. *Id.* at 58-60. In dismissing the appeal, the court of appeals ruled that it had already addressed the claim that the Tribe could not recover the proceeds of Montana's illegal taxes because the Tribe had not paid the taxes. *Id.* at 59-60. Citing its earlier opinions in *Crow I* and *Crow II*, the court of appeals indicated that the Tribe was entitled to such recovery because Montana's illegal taxes on tribal coal had taken revenue from the Tribe. *Ibid.*

5. The case returned to the district court, which conducted a second trial in 1994. Pet. App. 22-23.

There were two principal issues at that trial. The first was whether the Tribe was equitably entitled to the proceeds of Montana's illegal taxes on the Tribe's coal. *Id.* at 23-38, 43-54. The second was the Tribe's separate claim that Montana's coal taxes had unlawfully interfered with the Tribe's business and contractual relationship with Shell Oil Company (Shell), thereby causing the Tribe to lose revenues it would have received from coal-mining activities that would have occurred under leases with Shell but for Montana's illegal taxes. *Id.* at 38-42, 54-57.

The district court ruled against the Tribe on both issues. With respect to the proceeds of Montana's illegal coal taxes, the district court relied on a number of factors that it believed undermined the Tribe's claim of an equitable entitlement: (1) the Tribe did not provide significant governmental services to the ceded strip; (2) Montana's coal severance tax had been found to be lawful, as against Commerce Clause and Supremacy Clause challenges, in *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981); (3) Montana provides certain governmental services to the Tribe; (4) the illegality of Montana's coal taxes was not obvious during the relevant period; (5) the Tribe did not pay the taxes at issue, and Westmoreland, which had paid the taxes, had not sought to avoid or recover them; (6) the Tribe could have taken steps to try to cause Westmoreland to challenge Montana's taxes; and (7) even if Montana had not imposed the coal taxes, the Tribe would not have been able to impose a tax on the coal mined by Westmoreland, because the Department of the Interior had not approved the Tribe's effort to impose such a tax on coal mined in the ceded strip. Pet. App. 47-52.

As to the Tribe's claim regarding its efforts to negotiate coal-mining leases with Shell, the district court found that the coal taxes did not cause those efforts to fail. Pet. App. 42, 56. Specifically, the district court found that although Shell and the Tribe entered into a coal-mining lease agreement in 1972, the Tribe declared that lease invalid in 1974, before Montana imposed the taxes at issue. *Id.* at 38-39. The Tribe's decision to declare the lease invalid was prompted by its dissatisfaction with the terms of the lease, in particular by concerns about the impact of the lease on its sovereignty given that mining activities under the lease were to be conducted within the Reservation. *Id.* at 39.

The Tribe subsequently challenged the legality of the 1972 Shell lease in federal court, obtaining a judgment vacating the lease on the ground that applicable federal regulations had not been followed. Pet. App. 39-40. The Tribe and Shell sought to agree on new lease terms, but those negotiations were delayed by disagreements over "acreage size, options on additional tracts, tribal control over mining operations, and tribal ordinance restrictions." *Id.* at 41. Although Montana's coal taxes "left less room" for the Tribe and Shell to negotiate financial terms favorable to the Tribe, the district court found that the taxes were not responsible for the Tribe's loss of revenue due to the protracted negotiations between the Tribe and Shell.[4] *Ibid.* That delay, and the ultimate failure

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[4] Ultimately, the Tribe and Shell negotiated a new lease agreement, in 1980. Pet. App. 41. Shell never commenced operations under that agreement, however, and it relinquished its rights under the agreement in 1985. *Id.* at 41-42.

of Shell to conduct mining operations, were the result of other "causative factors." *Id.* at 42.

6. The Tribe and the United States appealed the judgment of the district court, and the court of appeals reversed in part and affirmed in part. Pet. App. 1-16. With respect to the proceeds from the illegally imposed taxes, the court of appeals held that the district court had erred in concluding that the Tribe was not equitably entitled to them. *Id.* at 7-12. Although the Tribe had not paid the taxes at issue, it had stated a claim for equitable relief, the court of appeals held, because the taxes "had an adverse impact on the Tribe's ability to market its coal, increased the costs of coal production, and reduced the royalty the Tribe could charge, 'taking revenue that would otherwise go towards supporting the Tribe and its programs.'" *Id.* at 11 (quoting *Crow II*, 819 F.2d at 902).[5]

The court of appeals further held that the factors the district court relied upon to reach a contrary conclusion were either irrelevant or contrary to earlier holdings of the court of appeals. Pet. App. 7-

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[5] The court of appeals distinguished *United States* v. *California*, 507 U.S. 746 (1993). There, this Court held that although the United States had reimbursed a government contractor for state taxes the contractor had paid to California, it could not recover those taxes in federal court, because the contractor had settled its tax liability with California, there was no claim that California's taxes violated federal law, and the United States had failed to seek tax relief under applicable state procedures. *Id.* at 751-759. The court of appeals in this case pointed out that *California* was a case in which the United States had voluntarily agreed to reimburse its contractor, while the Tribe in this case had done nothing comparable. Pet. App. 16. It also pointed out that there had been no determination in *California* that California's tax was unlawful. *Id.* at 8 n.2.

12. Specifically, the court of appeals concluded that the trial court had ignored direct evidence that the Montana legislature was aware that its coal taxes were potentially preempted, and had not put the contested revenues in escrow until well after the Tribe's lawsuit was underway. *Id.* at 9 & n.3. The court of appeals also emphasized its earlier holding, in *Crow I*, that Montana's coal taxes were "intentionally and illegitimately levied to appropriate most of the economic rent from Tribal coal." *Id.* at 10.

The court of appeals rejected the district court's reliance on the fact that Montana provided government services to the Tribe, because Montana would have furnished those services even if there had been no coal mining. Pet. App. 10-11. Similarly, the costs to Montana of any coal-related services were more than offset by revenues from coal-related taxes other than those at issue. *Id.* at 11. In sum, the court of appeals concluded:

> The equities in favor of restoring improperly collected revenues to the entity entitled to receive them are strong. Montana levied the unlawful taxes with the illegitimate intent of appropriating most of the economic rent from the Tribe's coal and the State benefitted from its wrong. The legitimate claim of the State on profits from the Tribe's coal is minimal and the Tribe's interest is strong.

Id. at 12.

The court of appeals therefore remanded the case for entry of an order directing Montana and Big Horn County to disgorge the illegally obtained taxes. Pet. App. 12. The court of appeals did not resolve outstanding disputes about whether the Tribe was entitled to

prejudgment interest and attorney's fees. *Id.* at 12, 14.

Finally, the court of appeals affirmed the district court's denial of the Tribe's claim for relief with respect to Shell Oil. The court of appeals agreed with the district court that the Tribe had failed to show that the illegal coal taxes were the cause of the breakdown of the relationship between the Tribe and Shell. Pet. App. 12-14.[6]

ARGUMENT

Petitioners no longer dispute that they obtained $58 million through illegal taxes assessed on coal owned by the Tribe. They no longer dispute that their "unique," "unusually large," and "extraordinarily high" taxes "imposed a substantial burden on the Tribe." *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 186 & n.17 (1989).[7] They seek review solely

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[6] The court of appeals distinguished two cases upon which the Tribe had relied in support of its argument that Montana should bear the burden of proving that its illegal taxes did not result in the breakdown of the relationship between the Tribe and Shell. Pet. App. 13 n.4 (discussing *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946), and *Mills* v. *Electric Auto-Light Co.*, 396 U.S. 375, 381-385 (1970)). The court of appeals distinguished *Bigelow* on the ground that the relaxed approach *Bigelow* took to the plaintiff's burden of proof was limited to proof of damages, and did not apply to the plaintiff's burden of establishing causation. *Ibid.* It distinguished *Mills* on the ground that the principles announced in that case, involving securities law, should not be extended into the present context. *Ibid.*

[7] The discussion of Montana's coal taxes in *Cotton Petroleum* was part of this Court's explanation of the differences between those taxes, which this Court had previously found to be unlawful, and the tax imposed by New Mexico on tribal

of the question whether they should nevertheless be permitted to retain the profits of their wrongdoing. The court of appeals correctly ruled that they must instead return those profits to the Tribe, the owner of the coal from which petitioners had "intentionally and illegitimately * * * appropriate[d] most of the economic rent." Pet. App. 10. Because the court of appeals' decision is consistent with the decisions of this Court and other circuits, and turns on the unique factual circumstances surrounding petitioners' illegal taxation of coal owned by the Tribe, this Court's review is not warranted.

The Tribe's conditional cross-petition does not, in any event, warrant review. The court of appeals' ruling that the Tribe was not entitled to recover damages in connection with the failed Shell lease rests on the factual conclusions of that court and the district court that the coal taxes did not cause the failure of that lease. Those factual conclusions do not merit further review. Nor does the ruling of the court of appeals conflict with decisions of this Court which have in certain contexts eased plaintiffs' burden of proving causation and damages.

1. Petitioners contend that the decision of the court of appeals conflicts with this Court's decision in *United States* v. *California*, 507 U.S. 746 (1993). That contention is erroneous.

In *California*, the United States sought to recover taxes that a federal contractor had paid to the State of California. 507 U.S. at 749. As this Court repeatedly emphasized, the state taxes at issue in that case were not alleged to have violated any federal right or

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leases of natural resources, which the Court upheld in *Cotton Petroleum*. 490 U.S. at 186 & n.17.

sovereign interest of the United States. *Id.* at 748 ("we are not presented with a claim that the state tax is unconstitutional"), 749, 752-753, 757-758.[8] Rather, the United States' claim was that the taxes were invalid as a matter of state law, and that the United States should be permitted to assert that claim in federal court because it had agreed to reimburse the contractor for costs, including state taxes. *Id.* at 751.

This Court held that the United States was not entitled to recover the taxes. *California*, 507 U.S. at 751-760. In reaching that conclusion, the Court held that the United States' voluntary decision to agree to reimburse its contractor for state taxes did not give rise to "a federal cause of action for money had and received to recover state taxes paid by" the contractor. *Id.* at 754. The Court further pointed out that although the United States had a right to be subrogated to the contractor's claim against California, the contractor had settled its claim with California. *Id.* at 756. Because the contractor's "rights have lapsed and its claims are barred," the Court held, general subrogation principles barred recovery by the United States. *Ibid.* Moreover, although general subrogation principles do not necessarily apply to the United States acting in its sovereign capacity, the United States was not acting in its sovereign capacity when it agreed to reimburse the contractor for state taxes. *Id.* at 757-758. Finally, the Court held that the United States' delay in bringing its federal suit was an

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[8] In fact, such a claim was unavailable in *California*, because this Court had previously held, in *United States* v. *New Mexico*, 455 U.S. 720, 733-735 (1982), that the States may tax federal contractors even if the burden of such taxes ultimately falls upon the United States.

equitable consideration supporting a conclusion that suit was barred. *Id.* at 759.

California is entirely consistent with the decision of the court of appeals in this case. Unlike the present case, *California* involved a state tax that was not claimed to violate federal law. Thus, the issue in *California* was whether the Court should recognize a cause of action under federal common law permitting the United States to attempt to recover state taxes it claimed its contractor should not have been required to pay as a matter of state law. 507 U.S. at 752.

In contrast, the Tribe and the United States in this case established that Montana's taxes violated federal law, by undermining tribal sovereignty and frustrating the purposes of federal statutes. The Tribe and the United States further established that Montana's illegal taxes injured the Tribe seriously, by significantly reducing the revenue it obtained from its mineral resources. The relief granted to the Tribe is properly understood as an exercise of the broad equitable authority of the federal courts to remedy violations of federal law. The existence and breadth of that equitable authority is beyond debate. See, *e.g.*, *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 399 (1946) ("Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief."); *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60, 69 (1992) ("[in a] long line of cases * * * the Court has held that if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief").

Petitioners, however, incorrectly understand this case as one involving an independent cause of action for restitution, sounding in federal common law. Pet. 2, 13-18. Although the source of the request for relief has not always been precisely specified during the course of these protracted proceedings, there can be no serious question that the Tribe and the United States sought to invoke the remedial authority of the federal courts to remedy a violation of federal rights. See, *e.g.*, Pet. App. 253 (in fourth amended complaint, Tribe indicates that it seeks "restitution and equitable relief," and that its claim for that relief arises from provisions of federal law violated by Montana's illegal taxes); *id.* at 74-85 (in rejecting Montana's claim that Tribe's request for restitution was solely matter of state law, district court states that "[h]aving established a violation of significant tribal interests based upon treaty and federal law, this Court has broad equitable powers to construct a remedy patterned after a state common law remedy").

In sum, petitioners' claim that the decision of the court of appeals conflicts with this Court's decision in *California* reflects a "misunderstanding over the difference between a cause of action and the relief afforded under it." *Franklin*, 503 U.S. at 69. When that misunderstanding is corrected, petitioners' claim of conflict evaporates.[9] *California*'s refusal to recog-

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[9] A similar misunderstanding is exhibited by the brief filed by *amici curiae* in support of the petition (at 1). There, *amici* claim that the ruling of the court of appeals means that any person suffering injury as a result of an unlawful state tax imposed on a third party would have a cause of action under federal common law for recovery of the taxes paid by the third party. The holding of the court of appeals suggests nothing of the sort. Rather, it simply reaffirms the broad equitable

nize a cause of action under federal common law in the circumstances before it (which involved only an alleged violation of state law) in no way conflicts with the ruling of the court of appeals granting the United States and the Tribe an equitable remedy with respect to an established violation of federal law.[10]

2. Petitioners also claim that the decision of the court of appeals conflicts with *Ute Indian Tribe* v. *State Tax Commission*, 574 F.2d 1007 (10th Cir.), cert. denied, 439 U.S. 965 (1978). That claim, too, is incorrect. In *Ute*, the Ute Tribe challenged the lawfulness of Utah's sales tax as applied to sales by a tribal enterprise located within a reservation. 574 F.2d at 1008-1009. The Tenth Circuit held that the

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authority of the federal courts to fashion remedies for violations of federal law.

[10] There are other significant distinctions between the present case and *California*. In *California*, the United States had voluntarily chosen to indemnify its contractor for state taxes, while in the present case Montana's illegal coal taxes were imposed over the Tribe's opposition. In *California*, the United States had failed to take advantage of administrative and state court proceedings in which it could have contested the legality of the state tax at issue, and had waited for years after the taxes were demanded to seek relief in federal court. 507 U.S. at 751, 756-759. In contrast, the Tribe in the present case promptly challenged the legality of Montana's coal taxes in the appropriate forum. Finally, in *California*, the United States was seeking relief not in its sovereign capacity, but rather simply in virtue of its contractual arrangements with a private party. *Id.* at 757. In the present case, the Tribe is seeking relief from illegal coal taxes that were found to have "impermissibly eroded the Tribe's sovereign authority." Pet. App. 6. These differences fully justify the court of appeals' observation that "*California* involved an entirely different factual situation" from that of the present case. *Id.* at 16.

tax was lawful as to sales to non-Indians but unlawful as to sales to Indians. *Id.* at 1009.

The Ute Tribe sought not only to enjoin the unlawful taxes, but also to obtain from the State the proceeds from the taxes that had been unlawfully imposed. 574 F.2d at 1009. The Tenth Circuit rejected the latter claim in a single paragraph, on the ground that the funds "were paid by the buyers of the goods and not by the sellers. If anyone can seek recovery or refund, it is these buyers." *Ibid.*

Ute differs from the present case in a critical respect: there is no suggestion in *Ute* that the sales tax at issue there had any adverse effect on the Ute Tribe as a whole. In contrast, in the present case, Montana's illegal coal taxes were imposed upon property owned by the Tribe, and were found to have substantially diminished the value of the property and the revenue the Tribe would otherwise have received from it. The Tenth Circuit's conclusion that the Ute Tribe could not recover illegal sales taxes paid by its individual members does not conflict with the remedy ordered by the court of appeals in the very different circumstances of the present case.

3. Petitioners claim that the ruling of the court of appeals presents important and novel issues meriting this Court's review. Pet. 19-21. To the contrary, the ruling of the court of appeals reflects the application of well established general principles to the unique circumstances of the present case. Further review is not warranted.

There is nothing novel about the court of appeals' exercise of equitable authority to require petitioners to surrender the proceeds of their illegal taxes. See *Ward* v. *Board of County Commissioners*, 253 U.S. 17, 21-24 (1920) (federal courts may order return to

Indians of proceeds from state taxes illegally derived from Indian property); see also p. 16, *supra*. Nor was it novel for the court of appeals to conclude that its equitable authority extended beyond the technical contours of common law rights of recovery such as assumpsit or constructive trust. Rather, as this Court stated in *Board of County Commissioners* v. *United States*, 308 U.S. 343, 350 (1939), "federal courts [are not] restricted to the remedies available in state courts in enforcing * * * federal rights."

Finally, the court of appeals appropriately exercised its equitable authority in the present case, and in any event further review is not warranted. The court of appeals required petitioners to surrender the proceeds of their illegal taxes to the Tribe because

> Montana levied the unlawful taxes with the illegitimate intent of appropriating most of the economic rent from the Tribe's coal and the State benefitted from its wrong. The legitimate claim of the State on profits from the Tribe's coal is minimal and the Tribe's interest is strong.

Pet. App. 12. Essentially, the court of appeals concluded that, but for Montana's illegal taxes, the Tribe would have received substantially greater benefits from its coal, whether in the form of royalties or in the form of the severance tax it had unsuccessfully attempted to impose upon Westmoreland. *Id.* at 11-12. That fact-specific conclusion is amply supported by the record. See, *e.g.*, Pet. App. 30, 96-100 (detailing evidence supporting conclusion that Montana's coal taxes deprived Tribe of royalty revenue); C.A. E.R. 12 (when Tribe sought to renegotiate its lease with Westmoreland, Westmoreland took position that "any

additional payment to the Tribe would have to be in lieu of, rather than in addition to, the state tax").[11]

In any event, the decision of the court of appeals to provide the Tribe with an equitable remedy in the unusual circumstances of the present case does not merit this Court's further review. This Court has recognized that Montana's illegal coal taxes were "unique" and "extraordinarily high." *Cotton Petroleum Corp.*, 490 U.S. at 186 & n.17. Petitioners provide no persuasive reason to believe that the ruling in this case is likely to have sweeping implications of the kind they hypothesize.

4. To the extent that petitioners suggest that review is appropriate in light of the sums of money that may be involved, their concern is in significant part

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[11] Petitioners particularly challenge the court of appeals' suggestion (Pet. App. 11-12) that Westmoreland would have paid the Tribe's severance tax but for the existence of Montana's coal taxes. Pet. 7-8. It is true that Westmoreland successfully opposed imposition of the Tribe's tax, and the Department of the Interior for some years incorrectly refused to approve it. Pet. App. 31, 36. Petitioners overlook, however, the fact that Westmoreland's opposition to the Tribe's tax stemmed in significant part from its resistance to concurrent taxation. *Id.* at 31. In the absence of Montana's preexisting taxes, it is far from clear that Westmoreland would have resisted the Tribe's severance tax. In any event, that factual issue does not merit this Court's review.

More importantly, even if Westmoreland would not have paid the Tribe's tax had there been no Montana taxes, the decision of the court of appeals does not turn on that point. The court of appeals also held that the existence of Montana's coal taxes reduced the royalties that the Tribe could charge (Pet. App. 11), and petitioners do not identify any barrier that would have prevented the Tribe from obtaining higher royalties had Montana's taxes not been in place.

premature. Although the court of appeals has conclusively determined the question of petitioners' liability for the illegal taxes they collected, it remains for the district court on remand to determine whether to award prejudgment interest, and if so in what amount. Pet. App. 12. Cf., *e.g.*, *Virginia Military Institute* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.") (citing cases).

More importantly, the relief accorded to the Tribe simply requires petitioners to surrender the proceeds of their illegal taxes. The substantial amount of money involved reflects the "extraordinarily high" taxation rates that petitioners unlawfully imposed upon the Tribe's coal, and petitioners are not well placed to complain that it would be inconvenient for them to return proceeds to which they were never entitled.[12]

5. The Tribe's conditional cross-petition does not warrant review, even if the Court were to grant the principal petition. The court of appeals' ruling that the Tribe was not entitled to recover damages in connection with the failed Shell lease rests on the factual conclusions of that court and the district court that the coal taxes did not cause the failure of that lease. Pet. App. 12-14, 54-56. Those factual

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[12] Montana's claims about the adverse fiscal consequences of the ruling of the court of appeals are also exaggerated, given that Montana's coal trust fund, into which it deposited a significant portion of the proceeds of the illegal severance tax at issue in this case, was valued at over $500 million in 1993. Pet. App. 25.

conclusions do not merit further review. See, *e.g.*, *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317 n.5 (1985).

There is no merit to the Tribe's claim that the holding of the court of appeals conflicts with decisions of this Court that have in certain contexts eased plaintiffs' burden of proving causation and damages. Cross-Pet. 13 (citing *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), and *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970)). First, the Tribe exaggerates the force of the rule articulated in *Bigelow*. Although the Tribe suggests that *Bigelow* requires that the burden of proof on questions of causation and damages be shifted to the defendant (Cross-Pet. 17), this Court has made clear that *Bigelow*'s effect is much more limited. See *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981) (*Bigelow* establishes that after antitrust plaintiff establishes violation, plaintiff's "burden is to some extent lightened").

The Tribe also overstates the sweep of the *Bigelow* rule. *Bigelow* does not, as the Tribe suggests, reflect a general lightening of the burden of proof borne by plaintiffs on issues of causation and damages. Rather, it applies principally in contexts in which the injury to the plaintiff is of a kind that makes proof of damages particularly difficult. See, *e.g.*, *Chrysler Motors*, 451 U.S. at 566 ("Our willingness to accept a degree of uncertainty in these cases rests in part on the difficulty of ascertaining business damages as compared, for example, to damages resulting from a personal injury or from condemnation of a parcel of land.").

It is not at all clear that such a rule must be applied to the relatively straightforward causation question at issue in this case, *i.e.*, whether the breakdown in

the relationship between Shell and the Tribe was caused by Montana's coal taxes or by other factors. The Tribe has not identified any decision that conflicts with the court of appeals' conclusion that the *Bigelow* rule did not apply to that causation question.[13]

Finally, the decision of the court of appeals does not conflict with *Mills*, 396 U.S. at 375. In *Mills*, the Court held that a stockholder challenging a merger on the ground that it was accomplished through use of a materially false proxy statement need not prove that the proxy statement caused the favorable vote of the stockholders. *Id.* at 381-386. The holding in *Mills*, however, turned in significant part on the conclusion that such an approach was necessary to effectuate a congressional purpose to ensure that shareholder votes were informed. *Id.* at 385. In the present case, there is no analogous congressional purpose relating to fair process. The court of appeals properly found that *Mills* was inapposite.

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[13] The court of appeals was not correct, however, to suggest categorically that the *Bigelow* rule does not apply to issues of causation. As the Tribe points out (Cross-Pet. 18-22), the *Bigelow* rule has been applied in certain contexts to issues of causation. This overstatement by the court of appeals was not essential to the outcome of the case, however, and provides no basis for review by this Court. See, *e.g.*, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) ("this Court reviews judgments, not opinions").

CONCLUSION

The petition for a writ of certiorari in No. 96-1829 and the conditional cross-petition for a writ of certiorari in No. 96-1984 should be denied.

Respectfully submitted.

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